MOTION FILED
APR 24 1987

(3)

No. 86-1548

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NORTHWEST AIRLINES, INC.,
Petitioner,
v.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS AMICI CURIAE SUPPORTING CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Air Transport Association of America ("ATA") and the Airline Industrial Relations Conference ("Air Conference") respectfully request this Court's leave to file a brief as amici curiae in support of the petition for certiorari filed by Northwest Airlines, Inc. ("Northwest") on March 26, 1987. Northwest has given its consent to the filing of this brief. Respondent Air Line Pilots Association, International, however, has refused to consent, necessitating this motion under Supreme Court Rule 36.1.

ATA and the Air Conference have a substantial interest in the disposition of this petition for certiorari. ATA is a Washington-based trade and service association of twenty-two United States airlines and two Canadian air-

lines. Air Conference is an independent, voluntary association of twenty-one United States scheduled air carriers.* Air Conference was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to represent the member carriers with respect to related legislative, judicial and administrative matters.

This case raises issues of extraordinary concern to all of ATA's and Air Conference's members. Northwest has petitioned the Court to review a District of Columbia Circuit decision holding that the district court did not have discretion to overturn an arbitrator's award reinstating a pilot who was terminated for flying a passenger jet while intoxicated. All member carriers have company alcohol use policies similar to the Northwest policy at issue here. They believe that their ability to enforce those policies is essential in discharging the obligation imposed upon them by the Federal Aviation Act to provide the "highest degree of safety" to the flying public. 49 U.S.C. § 1421(b).

ATA and Air Conference wish to provide this Court an industry-wide perspective on the issues raised by the petition. In the attached brief, ATA and the Air Conference describe the vital need for effective carrier measures that will prevent the slightest degree of danger to the flying public from pilot alcohol use. They describe current carrier alcohol use policies, and the origins of those policies outside the collective bargaining processes upon which the policy of deference to labor arbitration awards is premised. ATA and Air Conference present the industry's view as to why their obligation to preserve air safety should be recognized as a "public policy" justifying the reversal of a labor arbitrator's award under the criteria established by this Court in *W.R. Grace & Company v. Local 759, International Union of Rubber*

* Lists of ATA and Air Conference members appear as an appendix to the attached brief.

Workers, 461 U.S. 757 (1983). ATA and Air Conference believe that the attached brief will illustrate that the public safety issues Northwest petitions this Court to resolve have continuing, vital importance throughout this important sector of the Nation's transportation industry.

For these reasons, ATA and Air Conference respectfully request that the Court grant them leave to file the attached brief as amici curiae. This motion and brief are timely filed.

Respectfully submitted,

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Date: April 25, 1987

QUESTIONS PRESENTED

The Air Transport Association ("ATA") and the Airline Industrial Relations Conference ("Air Conference") submit this brief as amici curiae in support of the petition for certiorari filed by Northwest Air Lines, Inc. ("Northwest") on March 26, 1987.* This case presents two questions whose resolution will vitally affect the ability of ATA's and Air Conference's member air carriers to safeguard the flying public against the dangers created by alcohol use among pilots. Northwest has requested that this Court determine whether a reviewing court may overturn an arbitrator's award reinstating a pilot who had been discharged for flying a passenger jet while intoxicated. Northwest also has asked the Court to decide whether the Federal Aviation Act requirement that a carrier "maintain the highest degree of safety" deprives a Railway Labor Act arbitrator of jurisdiction to overrule a carrier's policy of requiring dismissal as the penalty for flying while intoxicated.

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* A formal statement of the interest of ATA and Air Conference in the disposition of the petition for certiorari appears in their foregoing Motion for Leave to File Brief as Amici Curiae in Support of Petition for Certiorari. Lists of ATA and Air Conference members are attached as an apendix to this brief.

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS AMICI CURIAE SUPPORTING CERTIORARI

STATEMENT

1. *Air Safety and Problems of Employee Alcohol Use*

Since the fares charged by scheduled air carriers were deregulated in 1978, air traffic has increased dramatically. There were 748,549 more aircraft departures in 1985 than in 1977, and 139,698,000 more passengers flown.[1] The scheduling difficulties caused by this in-

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[1] U.S. scheduled airlines had 4,936,519 scheduled departures in 1977 and 5,685,068 departures in 1985. The airlines carried

creased traffic, and the burdens imposed upon airports and air traffic control capacities, are well-publicized subjects of National transportation policy debate. To operate aircraft safely in this environment, pilots must perform at peak mental alertness and physical capacity at all times. The increased flight schedules have caused corresponding increases in airline employment. Each plane flown by an air carrier has a rotating, permanent crew of approximately fifteen pilots and thirty-five flight attendants.

The increase in air traffic coincides with a growing national concern about alcohol and drug abuse among transportation industry employees whose job performance affects passenger safety. The recent Amtrak-Conrail train collision, in which sixteen were killed and 170 were injured, illustrates the grievous consequences of errors in judgment caused by employee use of drugs or alcohol on the job. An alcohol or drug-related catastrophe in the airline industry would take a far greater toll than an accident in other forms of transportation. Domestic air disasters have claimed as many as 275 lives in a single incident.

Carriers involved in such disasters are subject to staggering liabilities. Recent settlements have reached over $800,000.00 per passenger in cases in which there were claims of carrier negligence.[2] Although there has been no commercial air disaster to date among U.S. carriers in which pilot alcohol use has been shown to be a factor,[3] carriers are justifiably concerned that juries might view

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240,326,000 revenue passengers in 1977 and 380,024,000 passengers in 1985. Air Transport 1986, The Annual Report of the U.S. Scheduled Airline Industry ("ATA Report") at 2. Copies of the ATA Report have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

[2] Settlements in the 1982 Air Florida crash at Washington, D.C. National Airport averaged over $800,000.00 per passenger.

[3] Federal Aviation Administration Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 44,432, 44,433 (1986).

their failure to prevent such incidents as gross negligence or recklessness, possibly justifying punitive damages in addition to the already overwhelming compensatory damages. Carriers that fail to conform to Federal Aviation Administration ("FAA") safety standards also can incur steep penalties and/or loss of their certifications.

2. *The Federal Aviation Act Public Safety Mandate*

In formulating all safety policies, including those relating to alcohol use, carriers are guided by the Federal Aviation Act public safety mandate. This mandate imposes upon carriers a duty to maintain public safety independent of the regulatory responsibilities of the FAA. The Aviation Act provides that "the [FAA] Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the *highest possible degree of safety in the public interest. . . .*" 49 U.S.C. § 1421(b) (Supp. 1987) (emphasis added).

Several circuits have recognized that this independent Congressional mandate justifies broad deference to air carrier safety measures. In upholding an age-forty cutoff for second officer applicants, the District of Columbia Circuit rejected an argument that the low probability of safety hazards was insufficient justification for the hardship to rejected individuals, reaffirming that a carrier must avert even the slightest potential danger:

> As an air carrier with a public duty to operate with the highest degree of safety, [a carrier] is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is the essence of [a carrier's] business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), *quoting Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 434 (N.D. Cal.

1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980). *See also Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236, n.30 (5th Cir. 1976) (airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*) (emphasis in original).

The Aviation Act requires the FAA to play the coordinate role of prescribing *minimum* standards for air safety and pilot qualification. 49 U.S.C. § 1421(a) (Supp. 1987). Pursuant to this authorization, the FAA has adopted regulations governing the qualifications for the pilot certifications required under the Aviation Act. FAA regulations establish requirements for training, flight proficiency, airplane performance ratings and related issues. *See generally*, 14 C.F.R., Part 61. The regulations also establish the minimum health qualifications needed for pilots to obtain FAA medical certificates. *See generally id.*, Part 67.

Evaluating pilot competency and judgment is an integral part of a carrier's public safety responsibility. While the FAA evaluates pilots' medical fitness through its medical certification procedures, FAA regulations make carriers solely responsible for "[p]roper evaluation of pilot performance including the detection of . . . personal characteristics that could adversely affect safety." 14 C.F.R. § 121.413(a)(4)(ii). Carriers are extremely selective in choosing, among medically certified persons, those individuals whom they believe best qualified to bear responsibility for the safety of hundreds of lives. There presently are 692,758 persons who hold FAA medical certificates, of whom 115,808 hold first-class certificates, but only 40,153 certified persons were employed by U.S. scheduled air carriers as of January 1, 1986.[4] The Ninth

[4] Statistics on numbers of currently certified persons were obtained by telephone from the FAA Statistics Division on April 23, 1987. Statistics for numbers of certified persons employed by U.S. scheduled carriers appear in ATA Report, *supra* note 1, at 12.

Circuit has recognized that federal law, as embodied in the Aviation Act mandate, entrusts airlines with the responsibility to evaluate whether an individual has the character and judgment to serve as a pilot-in-command. *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800 (9th Cir. 1978).

In accordance with the two-pronged air safety scheme, the FAA's regulations establish minimum standards for pilot alcohol use. The regulations prohibit service as a crew member while under the influence of alcohol, while having .04 percent or more alcohol in the blood by weight, or while subject to a medical deficiency such as alcoholism. 14 C.F.R. §§ 91.11(a)(2) and (4); 61.53. The regulations also prohibit consumption of any amount of alcohol within eight hours before serving as a crew member. *Id.* § 91.11(a)(1). The FAA has explicitly recognized that its eight-hour rule is "a 'rock-bottom' minimum," 35 Fed. Reg. 17,036 (1970), and that "an excellent rule is to allow twenty-four hours between the last drink and the takeoff time." 35 Fed. Reg. 9217 (1970).

3. *Carrier Alcohol Use Rules*

To prevent alcohol-related disasters, many carriers have adopted pilot alcohol use policies that are stricter than the FAA's minimum alcohol abstinence regulations.[5] Half of Air Conference's members have "twelve hour" or

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[5] Most carriers enforce company policies that are stricter than FAA minimum requirements on other issues that could affect in-flight safety. For example, the vast majority of carriers require applicants for pilot positions to have uncorrected 20/20 vision, even though FAA regulations require only 20/100 vision (correctable to 20/20) to obtain a first-class medical certificate. 14 C.F.R. § 67.13(b)(1). Also, most carriers require all three members of a flight crew—pilot, first officer and flight engineer—to have a first-class medical certificate, even though FAA regulations permit a flight engineer to have a second-class medical certificate. *Id.* § 63.31(c).

"twenty-four hour rules" similar to the Northwest rule at issue in this case.[6]

Most carriers have adopted employee assistance programs ("EAPs") to enable employees to seek rehabilitation for alcohol problems. Although the terms and conditions of carriers' EAPs vary, most resemble the Northwest program in requiring that the employee enter the program voluntarily, or through "intervention" procedures involving family members or co-workers, *before* the employee actually violates company rules and endangers public safety. All carriers offer reinstatement, generally with no loss of seniority or pay, to an alcoholic pilot who volunteers for rehabilitation under an EAP *without* violating company alcohol use rules.

All ATA member carriers maintain a strict separation between EAP rehabilitation procedures and the disciplinary measures applied to employees who violate company rules. Carriers deem it critical that they have the discretion to tailor sanctions to the seriousness and circumstances of the offense, and to judge whether the individual demonstrates the judgment and character needed in a person who is entrusted daily with responsibility for hundreds of lives. For serious offenses that reflect upon an employee's judgment and endanger public safety, all carriers deem it essential to protect the flying public by dismissing that individual, without offering him the same opportunity for rehabilitation and continued employment that a nonviolator would receive. No offense poses a more serious peril to human life, or reflects more poorly upon the judgment of the offender, than serving as a member of a flight crew while intoxicated.

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[6] In this case, Morrison violated the FAA "eight hour rule" and the prohibition against serving as a crew member while intoxicated, as well as the Northwest "twenty-four hour rule". This fact illustrates the untenable predicament that the arbitration award creates for carriers. Failure to impose discipline for violation of FAA rules could lead to severe civil liabilities or penalties; imposition of discipline results in an adverse arbitration award.

ATA carriers always have implemented their alcohol abstinence rules unilaterally. No carrier has ever established through collective bargaining its policy concerning the length of the pre-flight period during which it prohibits a pilot from drinking. More important, no carrier has ever negotiated concerning the disciplinary measures to be applied to pilots who violate the alcohol policy, either as a discrete bargaining issue or in connection with the industry standard of requiring "just cause" for pilot termination. The only subject related to alcohol use on which some carriers historically have bargained is the company's agreement to establish an EAP.

Recent grievances, in which arbitrators have found that carriers did not have "just cause" to terminate pilots who flew passenger aircraft while intoxicated, pose a serious threat to carrier efforts to safeguard the flying public. Such decisions will vitiate the deterrent purpose of carrier disciplinary policies by suggesting to alcoholic pilots that they need not immediately volunteer for rehabilitation, since even the most flagrant violations of alcohol use rules may not result in termination.

In the instant case, the System Board convened pursuant to the Railway Labor Act ordered reinstatement of pilot Morrison, who had jeopardized public safety by serving as first officer of a flight while intoxicated, on grounds that Morrison's actions were non-volitional due to his alcoholism. Grievance of Larry Morrison, Northwest Airlines, Inc. Pilots' System Board of Adjustment, Grievance 405-82 (Oct. 29, 1984), attached to Petitioner's Brief, Appendix at 71a. In another recent grievance, an arbitrator ordered Delta Airlines to reinstate pilot William Day, who served as a pilot-in-command while legally intoxicated. Grievance of William D. Day, Delta Airlines Pilots' System Board of Adjustment, ALPA Case No. 1-85 (Jan. 31, 1987), *complaint to vacate award pending sub nom. Delta Airlines, Inc. v. Air Line Pilots Association*, C.A. No. C87-239A (N.D. Ga., filed Feb. 12, 1987).

4. *FAA Rulemaking Proceedings on Alcohol and Drug Use*

Although the FAA has begun a rulemaking proceeding addressing drug and alcohol abuse in the aviation industry, the rules it may adopt cannot resolve the issues raised by this case. The FAA has indicated no intention to supplant individual carrier alcohol use rules, or carrier judgment on disciplinary measures to be applied to pilots who violate those rules. In an Advance Notice of Proposed Rulemaking, 51 Fed. Reg. 44,432 (1986) (to be codified at 14 C.F.R., Part 91) (proposed Dec. 9, 1986), the FAA stated that any new alcohol and drug abuse rules could include mandatory alcohol testing, including both random and scheduled testing and testing upon "reasonable suspicion," and extension of drug and alcohol rules to additional job categories such as mechanics. *Id.* at 44,434. The FAA also may require carriers to establish EAPs that would include "(1) prevention through education and training, (2) detection through training of employees and mandatory random testing and (3) rehabilitation." *Id.* Each element "would be required to conform with minimum FAA standards." *Id.* None of the specific questions on which the agency seeks comment concerns the discipline to be applied to individuals who violate present or proposed rules.[7] *See id.* at 44,434-36.

ATA's comments underscore the need to preserve carrier independence to adopt alcohol and drug use standards that exceed FAA minimums. Comments of the Air Transport Association of America to the FAA, Docket No. 25148 ("ATA Comments").[8] ATA proposes that the

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[7] In its questions concerning "minimum" EAPs, the FAA asks, "How far should a certificate holder go in terms of employee rehabilitation, *i.e.* how many 'relapses' should the employee be allowed?" 51 Fed. Reg. at 44,435. This question does not touch upon discipline for rule violators, since an alcoholic need not violate alcohol use rules in suffering a relapse of his medical condition.

[8] Copies of the ATA Comments to the FAA have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

FAA require carriers to adopt programs incorporating certain mandatory elements, including applicant screening, employee testing after accidents and "safety incidents" and upon "reasonable suspicion." ATA Comments at 3. ATA emphasizes the need to retain carriers' current practice of excluding rule violators from eligibility for EAP rehabilitation, *id.* at 3, 11-13, proposing that the FAA program include

> . . . one opportunity for rehabilitation for employees who voluntary admit to a drug or alcohol problem and are not in a job jeopardy status. Employees whose drug or alcohol use is discovered by testing, and *employees who have violated other company rules and who are in a job jeopardy status would not be entitled to participate in a rehabilitation program.*

Id. at 3 (emphasis added). ATA has advised the agency that any offer of additional opportunities for rehabilitation "should be left to the discretion of the carrier on a case-by-case basis." *Id.* at 12. ATA also emphasizes the need to preserve carriers' current practice of enforcing alcohol use rules, such as "twenty-four hour rules" that are more stringent than FAA's minimum "eight hour rule." *Id.* at 8.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IMPROPERLY RESTRICTED THE "PUBLIC POLICY" EXCEPTION THAT THIS COURT ESTABLISHED IN W. R. GRACE

The court of appeals' holding that the district court lacked discretion to overturn the arbitrator's award is based upon an insupportably narrow reading of the "public policy exception" articulated by this Court in *W. R. Grace & Company v. Local 759, International Union of Rubber Workers*, 461 U.S. 757 (1983). In *W. R. Grace*, the Court acknowledged that a court may refuse to enforce an arbitration award issued under a collective bar-

gaining agreement "if the contract as interpreted by [the arbitrator] violates some explicit public policy . . ." *Id.* at 766. The court stated

> Such a public policy, however, must be well-defined and dominant, and is to be ascertained '*by reference to* the laws and legal precedents and not from general considerations of supposed public interests.' *Muschany v. United States*, 324 U.S. 49, 66 (1945)

Id. at 766. (emphasis added)

The Court suggested several factors that might render an award contrary to public policy. These considerations include not only the factor proposed by the court of appeals—whether the award requires a party to violate a statute, regulation or court order—but also whether the award creates an incentive for a party or others to violate a clearly defined public policy, *id.* at 769, and whether other important policies would be adversely affected by the court's action. *Id.* at 770-71.

The petition in this case adequately demonstrates the conflict among the circuits regarding the proper scope of the public policy exception articulated in *W.R. Grace*, and amici will not belabor the point. For the reasons stated in the petition, this case should be heard together with *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, —— U.S. ——, 107 S.Ct. 871 (January 12, 1987) (No. 86-651), as the vehicle for resolving that circuit conflict. More important from ATA's and Air Conference's perspective, however, is the effect that the D.C. Circuit's overly restrictive reading of *W.R. Grace* will have on carrier's ability to enforce alcohol use rules.

The D.C. Circuit has ignored the Court's discussion of other considerations relevant to the "public policy" exception, and restricted the exception to cases in which the award contravenes positive law. The court below has rewritten the statement that public policy must be "as-

certained *by reference to* laws and legal precedents," somehow concluding that this Court must have "meant to say only that an arbitration award may not be enforced *if it transgresses* "well defined' and 'dominant' laws and legal precedents." *Northwest Airlines, Inc. v. Air Line Pilots Association, International*, 808 F.2d 72, 83 (D.C.Cir. 1987), *rev'g*, 633 F.Supp. 779 (D.D.C. 1985) (emphasis added). The court justifies its restrictive approach with the statement that the public policy exception must be extremely narrow, in keeping with the policy of deference to labor arbitration awards. *Id.*

Even if the Aviation Act safety mandate is not viewed as positive law that would be violated by enforcement of the award, the mandate certainly embodies the "well-defined and dominant policy" of maintaining air safety, which would be disserved by enforcement of the award. Because of its misunderstanding of the nature of the public safety mandate, the court of appeals fails to acknowledge the mandate as a countervailing statutory policy that must be balanced against the policy of enforcing labor arbitration decisions.[9] Instead, it incorrectly reasons that overturning the award would undermine what it views as the exclusive role of the FAA in regulating air safety:

> . . . the Board's award was conditioned upon a finding by the FAA—*i.e.*, the authorized public agency responsible for licensing pilots—that Morrison was fit and qualified to fly. *To suggest that the Board's award violates public policy is to contend that the FAA was derelict in its responsibilities in considering Morrison for recertification.* Obviously, it would be patently absurd for us, under the guise of "public policy," to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforce-

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[9] The district court correctly recognized the independent status of the FAA safety mandate. 633 F. Supp. at 788-96.

> ment of the public policy here at issue. Unless the FAA's decision to recertify Morrison is overturned pursuant to some lawful administrative or judicial proceeding designed to consider such matters, we must assume the legitimacy of Morrison's recertification. It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty. At its core, Northwest's argument seeks just such a result . . .

808 F.2d at 83. (emphasis added)

The court of appeals thus fails to recognize that its ruling thwarts carriers' ability to implement their *independent* safety mandate in their selection of trustworthy pilots. The court of appeals fundamentally misconstrues the agency's medical certification process by failing to recognize that an FAA medical certificate only represents that pilot has met minimal *medical* qualifications to fly aircraft. It is the carrier's responsibility to determine which of these medically certified pilots also possess the necessary attributes of judgment, temperament, and experience to transport their passengers. The small percentage of eligible, certified persons actually employed by carriers illustrates that carriers exercise great discretion in selecting pilots.

Moreover, the court of appeals disregards another public policy consideration recognized by this Court—the serious possibility that the award will create an incentive for other alcoholic pilots to violate public policy, as embodied in explicit FAA regulations as well as company rules, by flying while intoxicated. Morrison committed the most egregious possible breach of public safety, and yet has received reinstatement on terms that differ little from those he would have obtained if he had volunteered for rehabilitation *before* he endangered dozens of lives.

If enforced, the award will exacerbate alcoholic pilots' tendency to postpone the difficult personal and profes-

sional adjustments associated with entering rehabilitation. Pilots are more likely to delay acknowledging their drinking problems until after they are discharged for flying while intoxicated, knowing that they probably will be reinstated after completing a rehabilitation program and obtaining FAA recertification. If pilots thus believe that they will not be discharged for even the most serious breach of company rules and FAA regulations, it will be impossible for carriers to maintain the integrity of preflight alcohol use rules that are intended to ensure the highest possible degree of public safety. Carriers cannot counteract the threat to their safety measures by adopting stricter sanctions, including discharge, for lesser offenses, since these sanctions probably would be even more vulnerable to challenge in arbitration than discharges for flying while drunk.

Finally, even if the court of appeals were correct in ruling that violation of positive law is the only basis upon which courts may find that an arbitration award violates public policy, the award at issue does violate positive law. The Aviation Act mandate that carriers maintain "the highest possible degree of safety" is a federal statute, not a "general consideration of supposed public interests". Because the court incorrectly views a carrier's safety obligations as subsumed under FAA air safety regulations and actions taken thereunder, such as medical recertification of alcoholics, it does not take into account the carriers' universal practice of adopting individual safety rules that *exceed* FAA minimums, pursuant to their statutory duty. If carriers are unable to enforce these stricter standards through correspondingly stringent disciplinary measures, without having their judgment questioned because of the existence of lower FAA standards, carriers' ability to carry out their statutory mandate will be severely compromised.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE FEDERAL AVIATION ACT SAFETY MANDATE RESTRICTS THE JURISDICTION OF RAILWAY LABOR ACT ARBITRATORS, TO ELIMINATE CONTINUING UNCERTAINTIES ABOUT THE ENFORCEABILITY OF CARRIER SAFETY MEASURES

As Petitioner has indicated, the District of Columbia Circuit's decision conflicts directly with the Ninth Circuit's decision in *World Airways, Inc. v. International Brotherhood of Teamsters, supra.* In *World Airways,* the court held that the Aviation Act public safety mandate imposes substantive restrictions upon the jurisdiction of Railway Labor Act arbitrators. The Ninth Circuit concluded that a system board had overstepped its jurisdiction by ordering retraining for a pilot who had been demoted for numerous errors of judgment, on the ground that determining competency and fitness of a pilot is statutorily entrusted to the airline as part of its nondelegable duty to maintain the highest standards of public safety. The District of Columbia Circuit, however, looked solely to the terms of the Northwest/ALPA collective bargaining agreement to determine whether the parties themselves had agreed to exclude safety issues from the scope of contractual grievance arbitration:

> There is *nothing* in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review. Indeed, quite the contrary is true because *all* disciplinary actions taken pursuant to Section 19 are made subject to Board review under Section 21. There is no conceivable way to construe the parties' agreement as removing from the Board's jurisdiction disciplinary actions related to alleged breaches of the twenty-four hour rule.

808 F.2d at 81-82. (emphasis in original). The court states, ". . . it is not the role of the courts to alter the

labor-management balance struck in the collective bargaining agreement." *Id.* at 83.

As the foregoing statements illustrate, the decision is based upon a mistaken understanding of historical patterns of bargaining concerning public safety issues covered by the FAA mandate. Safety measures like the twenty-four hour rule have never been a subject of a collective bargaining agreement between ALPA and any carrier. Rather, each carrier has always implemented its safety rules unilaterally. It has long been the carriers' understanding that grievance arbitrations concerning safety issues are confined to factual determinations of whether the grievant committed the infraction of which he was accused, not the validity of the carrier's safety policies or the *de facto* modification of those policies through alteration of the specified sanctions.

Absent resolution of the conflict among circuits, carriers will face continuing uncertainty about the enforceability of the disciplinary measures they believe necessary to implement the Aviation Act public safety mandate. Without the Court's guidance as to whether an arbitrator has jurisdiction—other than as a fact-finder—to overrule a carrier's decision to discharge a pilot who flies while intoxicated, carriers will remain uncertain as to how they may prevent the unacceptable safety risk of allowing that pilot to continue flying. In this period of expanding commercial airline traffic, such uncertainty in itself poses a hazard to public safety.

CONCLUSION

For the foregoing reasons, ATA and Air Conference respectfully submit that this Court should grant a writ of certiorari.

Respectfully submitted,

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Date: April 25, 1987

APPENDIX

ATA MEMBERS

AirCal
Alaska Airlines
Aloha Airlines
American Airlines
Braniff
Continental Airlines
Delta Air Lines
Eastern Air Lines
Evergreen International Airlines
Federal Express
The Flying Tiger Line
Hawaiian Airlines
Midway Airlines
Northwest Airlines
Pan American World Airways
Piedmont Airlines
PSA-Pacific Southwest Airlines
TranStar Airlines
Trans World Airlines
United Airlines
United Parcel Service
USAir

Associate Members

Air Canada
Canadian Pacific Air Lines

AIR CONFERENCE MEMBERS

Airborne Express
AirCal
Alaska Airlines
Aloha Airlines
America West Airlines
American Airlines
Braniff Airways
Continental Airlines
Eastern Airlines
The Flying Tiger Line
Midway Airlines
Northwest Airlines
Pacific Southwest Airlines
Pan American World Airways
Piedmont Airlines
Reeve Aleutian Airways
Tower Air
Trans World Airlines
United Airlines
USAir
World Airways